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Supreme Court, U.S.
FILED

97 819 NOV 17 1997

OFFICE OF THE CLERK

No. ~~A 209~~

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

BERNARDINE GREENE -- PETITIONER

VS.

ALAN GREENBERG, D.P.M. et al-

RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO

THE SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

PETITION FOR WRIT OF CERTIORARI

Bernardine Greene

70 Parkview Drive

Succasunna, New Jersey 07876

973-584-6326

40pp

QUESTION PRESENTED:

Whether the Superior Court of New Jersey, Appellate Division, violated petitioner Greene's procedural due process rights under the United States Constitution when the Court dismissed her appeal when petitioner had neither submitted an appeal brief nor been given a due date to submit the brief. She was in the process of moving for reconsideration of her motion for leave to appeal to the Supreme Court of N.J. and had moved for a stay of appellate proceedings. Her appeal was dismissed on the same date that her motion for reconsideration of a stay of appellate proceedings was denied. Continuing to perfect her appeal by complying with the Court's final decision on the stay was made impossible by the granting of the crossmotion for dismissal.

LIST OF ALL PARTIES

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

ALAN GREENBERG, D.P.M.

OPTIMUM PHYSICAL THERAPY CENTER

LISA TEN EYCK, PHYSICAL THERAPIST

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TABLES OF AUTHORITIES CITED

CASES and PAGE NUMBERS WHERE CITED

- Insurance Corp. of Ireland, Ltd. vs Compagnie des Bauxites de Guinee, 456 U.S. 694, 102 S.CT.2099, 2017, 72 L.Ed.2d 492(1982)
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- Thompson vs. Housing Authority, 782 f.2d 831 (9th Cir.) cert. denied, 479 U.S. 829, 107 S.Ct.112,93 L.Ed.2d 60(1986)
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- Wanderer vs. Johnson, 910 F.2d at 652 (9th Cir. 1990)
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- Wyle vs. R.J. Reynolds Industries, Inc. 709 F.2d 585, 591 (9th Cir. 1983)
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below:

OPINIONS BELOW

For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix A to the petition

JURISDICTION

For cases from state courts:

The date on which the highest state court decided my case was April 24, 1997. A copy of that decision appears at Appendix C

A timely petition for rehearing was thereafter denied on the following date: June 18, 1997, and a copy of the order denying rehearing appears at Appendix D.

An extension of time to file the petition for a writ of certiorari was granted to and including November 17. 1997 on September 9, 1997 in Application No. A-203 and appears at Appendix E.

The Jurisdiction of this Court is invoked under 28 U.S.C. 1257(a)

STATEMENT OF CASE

Petitioner, Bernardine Greene, brought an appeal, pro se, against a doctor of podiatric medicine and a physical therapy center/therapist in an action arising out of medical malpractice. The trial concluded with the jury unanimously finding the doctor negligent as charged[1] but not finding this negligence to be the cause of the liability (the neurological disease known as Reflex Sympathetic Dystrophy Syndrome or 'RSD').

Petitioner filed an appeal 7/25/95, intending to prove that the proximate cause of the liability could only have been the proven negligence and that the

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[1] Charge taken from Transcript of Proceedings April 11, 1995 Vol.VIII of X p 8.132 '....plaintiff contends that Dr.Greenberg negligently injected her with cortisone resulting in the development of....RSD'

verdict was inconsistent with the trial evidence concerning the liability and its proximate cause and had occurred primarily because of plain error, especially with regards to the jury verdict form (Appendices G & H: verdict form and proposed issues).

Due to the very limited focus of this appeal, any testimony concerning damages, all of which occurred a year or more after the liability, was irrelevant. Starting on 8/25/95, petitioner directly corresponded with her adversaries requesting their permission to allow her to exclude certain costly and lengthy testimony concerning damages. Defendant Greenberg's attorney did not respond. Defendant Optimum Physical Therapy Center's attorney responded denying

petitioner's request simply stating that all the transcripts were 'necessary'. However, he neither submitted argument nor supporting documentation to show how, specifically, the named transcripts were relevant to the very limited scope of her appeal.

Petitioner wrote again to the defense attorneys to 1) attempt to get some response from defendant Greenberg's attorney and 2) to get defendant Optimum's attorney to address her specific allegation. After she did not receive a response from either defense attorney, petitioner spoke with her case manager and then motioned the Court on 10/26/95 for permission to abbreviate transcripts.

During the two months that petitioner had corresponded directly with her

adversaries regarding omitting certain transcripts, she demonstrated her intent to handle her responsibilities in a timely manner. She 1) filed a motion for oral argument, 2) submitted most of her appeal issues, 3) procured and made copies of the transcripts and sent all required copies to the court and her adversaries EXCEPT for those transcripts she sought to omit.

The next year (10/95-10/96) was spent on the process of seeking permission from the Court to omit testimony irrelevant to the appeal. Petitioner conscientiously pursued this issue, always consulting with her case manager regarding correct procedure.

Petitioner's motion to abbreviate transcripts, or in the alternative a

limited remand, although not contested, was denied in all respects in an order filed almost 2 months after her motion was filed. (Appendix I)

In addition to the fact that the process of motioning the court is extremely time-consuming[2], this issue went on as long as it did because, rather than address petitioner Greene's <u>specific allegation</u>, her adversaries used methods to mislead and confuse, intentionally causing unnecessary delay.

Petitioner consistently <u>tried</u> to get her adversaries to address her specific allegation that the testimony she moved to omit was irrelevant to the appeal because the testimony dealt only with

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[2] it took 5 months for the Supreme Court of N.J. to reply to the 5/10 motion for leave to appeal

damages and their proximate causes and her appeal dealt only with liability and its proximate cause.[3] Her adversaries, instead:

- avoided addressing this one very specific allegation
- introduced and argued issues irrelevant to the specific allegation and supported these arguments with documentation relevant to damage issues and their proximate causes

Because the defense attorney chose to mislead, the Court was clearly confused when they decided to deny petitioner's motion for reconsideration since their

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[3] 'I implore your Honors to require that my adversary support his net allegation with specific fact to show in what way the testimony I want to omit is relevant specifically to the proximate cause of RSD.' (page 12 of appellant's motion for reconsideration of dismissal)

stated reason for denial (Appendix J) was untrue in this case.[4]

It was only this one time, in regards to this 3/7/96 motion, that petitioner failed to comply with an explicit court order and this was an honest and understandable error due to her very limited pro se experience at that time[5].

After receiving this denial, petitioner spoke with her case manager and, as a result, moved for leave to appeal to the Supreme Court of N.J. to continue to attempt to gain permission to omit transcripts.

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[4] 'proximate cause' and 'damages', in this case, are not mutually exclusive as claimed by the Appellate Court since the testimony moved to omit dealt with damages and their proximate causes

[5] petitioner misunderstood the second paragraph in the supplemental and did not know she had been given the limited remand she had requested

After petitioner filed her motion for leave to appeal, the following events occurred:

- On 5/25/96 petitioner's case manager with whom she had dealt for the first 10 months of the appeal left on 'maternity leave'
- On 6/10/96 petitioner was assigned a NEW CASE MANAGER.
- On 7/18/96 petitioner was ordered to file a motion for stay of appellate proceedings[6] and did so.
- After 8/12/96, when petitioner needed to speak with her case manager, she received no reply

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[6]this occurred after petitioner called the N.J.Supreme Court and, based on information received, notified the appellate division that her motion for leave to appeal would not be heard until after the court returned in September

to letters or phone messages[7]

- On 8/31/96 petitioner received a denial for a stay of appellate proceedings
- On 9/10, after many prior attempts to contact her case manager, petitioner was told that the case manager 'left'
- On 9/12/96 petitioner was assigned a NEW CASE MANAGER
- On 9/25/96 petitioner moved for reconsideration and clarification to the denial on stay of appellate proceedings
- On 10/4/96 petitioner received:
    - <u>from the NJ Supreme Court</u>: an order denying her 5/10/96 motion for leave to appeal limiting transcripts

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[7]on 8/13/96 petitioner was told that her case manager was on vacation until 8/19. After this, petitioner wrote and then called several times and got no reply

- from defendant Greenberg's attorney:
  1. opposition brief to her motion for reconsideration of stay of appellate proceedings
  2. crossmotion to dismiss the appeal based on allegations concerning procedural transgressions

Since petitioner's immediate priority was to answer the crossmotion, she 1) moved for an extension of time to file a motion for reconsideration and clarification in response to the N.J. Supreme Court's denial regarding abbreviating transcripts and 2) submitted a brief arguing why the crossmotion should not be granted. The latter was denied and the crossmotion to

dismiss was granted.

Petitioner had understood that if the court denied her request for reconsideration of the stay of proceedings she would be compelled to order the transcripts she had moved to omit and proceed with perfecting the appeal and she would have done so.

However, the order denying reconsideration of stay of proceedings was issued ON THE SAME DATE as the order granting the crossmotion to dismiss, making it impossible for her to proceed unless the court would reconsider their decision to dismiss the appeal.

Petitioner filed a motion for reconsideration and clarification on 11/12/96. In her brief, petitioner made an honest and sincere effort to convince

the Appellate Court to reverse their decision to dispense the ultimate sanction of dismissal.[8]

The Court did not change its opinion and, on 12/11/96, denied the motion in all respects.

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8 '...I assure you that I am not the person my adversaries try to project....I am at a loss as to how to communicate with the Court in response to my adversaries' misleading allegations'...I beg you to please reconsider your decision to dismiss my appeal.. If you instruct me to order the remaining transcripts..., I will do so immediately and move along with this appeal...please, don't take away my opportunity to complete this appeal...' (from 'Conclusion' section of brief)

REASONS FOR GRANTING THE PETITION

Petitioner's procedural due process rights have been violated.

Although petitioner Greene's appeal was of merit and the issues valid and well-supported by trial evidence, she was never permitted to submit an appeal brief and make the detailed arguments supporting the issues on appeal (Appendix H). This situation occurred because the appeal was dismissed, not based on the merits, but on false and unsupported allegations regarding petitioner's 'procedural deficiencies' made by defendant Greenberg's attorney[9]. Although petitioner made only one procedural error in response to any explicit court rule or order, her

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[9] specific allegations and arguments were submitted by Defendant Greenberg's attorney. Defendant Optimum Physical Therapy Center supported the allegations by submitting correspondence stating they would 'join' Defendant Greenberg

adversary alleged that every procedural action taken by Ms.Greene was negligent.[10]

Petitioner Greene's right to procedural due process was violated and the decision to dismiss was unwarranted and should be reversed.

The United States Supreme Court has recognized that sanctions for procedural defects are limited by due process considerations. The sanction of a court must be "just" and it must be specifically related to the particular 'claim' which was at issue in the order

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10 '...plaintiff's pro se status does entitle her to some...latitude, it does not authorize carte blanche status to disregard all court rules and court orders...plaintiff has repeatedly failed to comply with court rules and court orders.' (excerpts from pages 4 & 11 of defendant Greenberg's attorney's reply to appellant's brief on reconsideration of dismissal)

to provide discovery. Insurance Corp. of Ireland, Ltd. vs. Compagnie des Bauxites de Guinee, 456 U.S. 694, 102 S.Ct.2099, 72 L.Ed.2d 492 (1982)

Federal courts consider five factors in determining whether a dismissal is appropriate for a procedural violation. These factors, as listed in Thompson vs. Housing Authority, 782 f.2d 831 (9th Cir.) cert. denied, 479 U.S. 829, 107 S.Ct. 112, 93 L.Ed.2d 60 (1986), are:

(1)'the public's interest in expeditious resolution of litigation;

(2)the court's need to manage its dockets;

(3)the risk of prejudice to [the party seeking sanctions];

(4)the public policy favoring disposition of cases on their merits; and

(5)the availability of less drastic sanctions.'

"The first two of these factors normally favor the imposition of sanctions, while the fourth factor cuts against a dismissal action. Thus, the key factors are prejudice and availability of lesser sanctions."

Wanderer vs. Johnson, 910 F.2d at 652 (9th Cir. 1990)

It is essential to find an element of prejudice for a sanction as serious as dismissal. The Court of Appeals panel in Wyle vs. R.J. Reynolds Industries, Inc. 709 F.2d 585, 591 (9th Cir. 1983) held that sanctions which interfere with a litigant's claim or defenses violate due process when they are imposed

"merely for punishment of an infraction that did not threaten or interfere with the rightful decision of the case." Delay alone, without a focus on its effects, will not justify dismissal.

In the instant case, petitioner's actions did not prejudice the appellees in any way. There was not even an allegation from appellees that this delay threatened or interfered with the rightful determination of the case. Appellees simply argued that petitioner was taking too long in filing her brief on the merits of the case.[11]

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[11]'The fact is that this appeal has gone on for more than a year and a half without the entire transcript being provided and without a brief being filed ..in support of her appeal.' (page 10 of defendant Greenberg's attorney's reply to appellant's motion on reconsideration of the dismissal)

At worst, petitioner's actions led merely to delay. Although Ms.Greene did nothing intentional to cause delay, the appeal process was delayed by the defense's decision to use arguments intended to mislead and confuse[12].

Thus, it is respectfully submitted that the New Jersey Superior Court, Appellate Division, wrongfully violated petitioner Greene's Federal procedural due process rights by imposing the ultimate sanction of dismissal. This violation was ratified by the New Jersey Supreme Court's decision not to review the case.

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12 In her motion for reconsideration to abbreviate transcripts, appellant alleged that the testimony moved to omit was irrelevant to the appeal since it dealt only with DAMAGES. Her adversary intentionally misled the court by responding that the testimony was relevant because it dealt with 'proximate cause' when he knew it had to do only with proximate cause of DAMAGES

Your Honor, public policy favors disposition of cases on their merits. This case is of merit since the proposed issues are valid and can be supported by trial evidence. However, Ms. Greene's pro se appeal was dismissed, not based on MERITS, but on false and unsupported allegations of procedural negligence. Use of such tactics might be considered fair when all the adversaries are attorneys; they are grossly unfair when an adversary is a pro se litigant. In such a situation, the FACTS, ISSUES & MERITS must take precedence.

Petitioner submits that the only remedy that would rectify this egregious violation of her rights would be for this Court to reverse and remand this matter back to the New Jersey Superior Court, Appellate Division, for the matter to be heard on the merits.

CONCLUSION

The petition for a writ of certiorari should be granted

Respectively submitted,

Bernardine Greene

DATE: 11/14/97

APPENDIX A

ORDER ENTERED IN CONJUNCTION WITH JUDGMENT SOUGHT TO BE REVIEWED

ORDER ON CROSS MOTION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

BERNARDINE GREENE V ALAN GREENBERG DPM
AND OPTIMUM PHYSICAL THERAPY CENTER
ET AL

DOCKET NO. A -006425-94T3
MOTION NO. M -000944-96

CROSS MOTION FILED: OCTOBER 04, 1996
BY: ALAN GREENBERG
ANSWER FILED: OCTOBER 22, 1996
BY: BERNARDINE GREENE

SUBMITTED TO COURT: OCTOBER 28, 1996

MOTION BY RESPONDENT TO DISMISS THE
APPEAL: GRANTED

FILED APPELLATE DIVISION OCT 31 1996

APPENDIX B

ORDER ON REHEARING

ORDER ON MOTION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

BERNARDINE GREENE V ALAN GREENBERG DPM
AND OPTIMUM PHYSICAL THERAPY CENTER
ET AL

DOCKET NO. A -006425-94T3
MOTION NO. M -001907-96

MOTION FILED: NOVEMBER 12, 1996
BY: BERNARDINE GREENE

ANSWER FILED: NOVEMBER 22, 1996
BY: ALAN GREENBERG

SUBMITTED TO COURT: DECEMBER 09, 1996

MOTION BY APPELLANT FOR RECONSIDERATION
AND CLARIFICATION: DENIED

SUPPLEMENTAL: The motion is denied in
all respects

FILED APPELLATE DIVISION DEC 16 1996

APPENDIX C

ORDER ON PETITION FOR CERTIFICATION

SUPREME COURT OF NEW JERSEY
C-869 September Term 1996
Case number 43,475

BERNARDINE GREENE, Plaintiff-Petitioner
v.
ALAN GREENBERG, et al.,Defendant-Respondents

To the Appellate Division, Superior Court:

A petition for certification of the judgment A-6425-94 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs

FILED: APR 24 1997

APPENDIX D

ORDER ON REHEARING ON PETITION FOR CERTIFICATION

SUPREME COURT OF NEW JERSEY
M-1420 September Term 1996
Case number 43,475

BERNARDINE GREENE, Plaintiff-Movant,
v.
ALAN GREENBERG, et al.,Defendants.

This matter having been duly presented to the Court, it is ORDERED that the motion for reconsideration of the petition for certification is denied.

FILED: JUN 18 1997

APPENDIX E

LETTER GRANTING AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR WRIT OF CERTIORARI

LETTER DATED: September 9, 1997

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

BERNARDINE GREENE
v. ALAN GREENBERG, et al.

Application No. A-203

Dear Ms. Greene:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Souter, who on September 9, 1997, extended the time to and including November 17, 1997.

This letter has been sent to those designated on the attached notification list.

Sincerely, WILLIAM K. SUTER, Clerk

APPENDIX F

JUDGMENT following trial ending 4/12/95

Superior COURT, LAW DIVISION, Morris
COUNTY: DOCKET NO. MrsL-713-91
STYLE OF ACTION: Medical Malpractice

Bernardine Greene
vs.
Alan Greenberg, DPM, Optimum Physical Therapy Center and Lisa Ten Eyck,LPTA

HOW ENTERED: JURY VERDICT
DATES OF TRIAL: March 27,28,29,30,31
April 3,4,5,6,7,10,11,12 1995

AGAINST: Bernardine Greene - Plaintiff
IN FAVOR OF: Alan Greenberg, DPM; Optimum Therapy Center and Lisa Ten Eyck, LPTA - Defendants

No cause of action for the plaintiff

DATED 5/22/95

APPENDIX G

VERDICT FORM

NOTE** The jury ceased deliberations after completing questions 1 & 2 and brought in a verdict. The jury of 8 answered questions 1 & 2 as noted below:

1. Was the defendant, Dr.Alan Greenberg negligent, that is, did he deviate from standard podiatric practice?
   Yes 8 No 0 .
   If your answer to this question is 'no'. cease your deliberations and return your verdict at this point.
   If your answer is 'yes' proceed to Question #2.

2. Was the negligence, that is the deviation from standard podiatric practice of defendant, Dr.Alan Greenberg a proximate cause of the development of Reflex Sympathetic Dystrophy (RSD)?
   Yes 1 No 7 .
   If your answer to this question is 'no' cease your deliberations and return your verdict at this point.
   If your answer is 'yes' proceed to Question #3.

3. Was the defendant, Lisa Ten Eyck negligent, that is, did she deviate from standard therapy practice?
   Yes _____ No _____
   If 'no' proceed directly to Question #6 dealing with damages.
   If 'yes' proceed to Question #4

4. Was the negligence, that is the deviation from standard therapy practice of defendant, Lisa Ten Eyck a proximate cause in aggravating or worsening of the development of Reflex Sympathetic Dystrophy (RSD)?
   If 'no' proceed directly to Question #6 dealing with damages.
   If 'yes' proceed to Question $5.

5. If you find that you have found both of the defendants negligent and that their respective negligent conduct proximately caused the incident in question, then you must answer this questions. Taking the combined negligence of those defendants which proximately contributed to the development of Reflex Sympathetic Dystrophy (RSD) as being 100% -- what percentage of such total negligence is attributable to:
   A. Defendant, Dr. Alan Greenberg __%
   B. Defendant, Lisa Ten Eyck __%
   TOTAL:100%

6. DAMAGES: What amount of money would fairly and reasonably compensate the plaintiff, Bernardine Greene for her injuries and losses for:
   Pain, suffering, disability, impairment and loss of enjoyment?$___
   Medical Bills? $___
   Past Lost Earnings? $___
   Future Lost Earnings? $___

APPENDIX H

6 PROPOSED ISSUES TO BE RAISED ON APPEAL

Below is the context of the 6 isssues that were to be argued in the final appeal brief

1 - The preponderance and weight of the evidence regarding the physical condition of the plaintiff's right foot supports the plaintiff's contention that the PROXIMATE CAUSE OF RSD was defendant Greenberg's negligent act of administering a cortisone shot on 2/16/89.

2 - The Court committed plain error by wording the questions on the verdict form in such a way as to create an illogical sequence that was prejudicial to the plaintiff.

3 - The court committed plain error when it failed to specifically define the negligence in question 1 of the verdict form as it had clearly defined the negligence in the charge: that NEGLIGENCE being the cortisone injection. This error allowed the defense to successfully argue, during the J.N.O.V. hearing, that the unanimous jury vote on negligence did not necessarily mean that the jury found that negligence to be the cortisone shot.

4 - The court committed plain error when, in question 2 on the verdict form, it asked the jury to decide separately on proximate cause of the liability, RSDS, after they had found defendant Greenberg negligent in answer to question 1.

5 - The court committed plain error when it decided to allow defendant Greenberg's expert on negligence, an orthopedist, to be presented for the first time, on the day he testified, as an RSD expert and go far beyond the scope of his expert report by giving expert testimony in the area of NEUROLOGY, especially the RARE neurological disease known as 'RSD'.

6 - The judge rushed the verdict when he decided to give the jury the option to rely on their memory rather than re-hear crucial testimony related to PROXIMATE CAUSE OF RSD that they requested to hear 5 hours into deliberations and within 1 hour of one of the jurors leaving to catch a plane.

APPENDIX I

ORDER ON MOTION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

BERNARDINE GREENE V ALAN GREENBERG DPM
AND OPTIMUM PHYSICAL THERAPY CENTER
ET AL

DOCKET NO. A -006425-94T3
MOTION NO. M -001556-95

MOTION FILED: OCTOBER 31, 1995
BY: BERNARDINE GREENE
ANSWERS FILED: NONE

SUBMITTED TO COURT: DECEMBER 18, 1995

MOTION BY APPELLANT TO ABBREVIATE TRANSCRIPTS OR IN THE ALTERNATIVE FOR A LIMITED REMAND: DENIED

SUPPLEMENTAL: The motion is denied in all respects

FILED APPELLATE DIVISION DEC 26 1995

APPENDIX J

ORDER ON MOTION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

BERNARDINE GREENE V ALAN GREENBERG DPM
AND OPTIMUM PHYSICAL THERAPY CENTER
ET AL

DOCKET NO. A -006425-94T3
MOTION NO. M -003215-95

MOTION FILED: JANUARY 22, 1996
BY: BERNARDINE GREENE
ANSWERS FILED: FEBRUARY 16, 1996
BY: OPTIMUM PHYSICAL CTR

SUBMITTED TO COURT: MARCH 04, 1996

MOTION BY APPELLANT FOR CLARIFICATION
AND RECONSIDERATION: DENIED

SUPPLEMENTAL: The Court notes that the expert testimony sought to be excluded is alleged to relate to issues other than damages, such as proximate cause.

Our denial is without prejudice to an application to the trial court in accordance with R. 2:5-3(c)(2)

FILED APPELLATE DIVISION MAR 7 1996